IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 837 of 1988

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT
Versus
NIZAMUDDIN SHEKHKARIM SHAIKH

Appearance:
1. Criminal Appeal No. 837 of 1988
MR BD DESAI, APP for Appellant
MR US BRAHMBHATT for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

Date of decision: 05/03/2004

ORAL JUDGEMENT

(Per : J.M.PANCHAL, J.)

Instant appeal filed under Section 378 of the Code of Criminal Procedure, 1973 is directed against judgment dated April 26, 1988 rendered by the learned Additional City Sessions Judge, Court No.16, Ahmedabad, in Session Case No.255 of 1987 by which the appellant is acquitted of the offence punishable under Section 20(b)(ii) of the Narcotic Drugs & Psychotropic Substances Act, 1985, ("the Act" for short).

2. Police Constable, Vinodkumar Mafabhai, of Karanj Police Station, had received an information on November 23, 1986 that the respondent was dealing in charas near Remand Home, Khanpur, Ahmedabad. He had conveyed the information received by him to Head Constable, Jagatsinh Adesinh. Head Constable, Jagatsinh, had made arrangement to summon Pravinbhai and Ilabhai to act as panch witnesses. As abovereferredto two persons had shown inclination to act as panch witnesses, they were informed about the information received by Constable, Vinodkumar. The two Police Officials in the company of panch witnesses had gone to the place which was indicated in the information. The respondent, who was standing near Remand Home, was pointed out by the Police Officials to the panch witnesses and was thereafter apprehended. The person of the respondent was searched which resulted into find of a plastic bag from right hand side pocket of pant put on by him. The plastic bag was containing black coloured substance and was smelling like charas. On demand, the respondent could not produce any pass or permit authorising him to possess charas. The substance found from the possession of the respondent was wrapped in a paper on which signatures of panch witnesses were obtained and thereafter, the packet was tied by means of twine, on which seal of Police Inspector, Karanj Police Station, was applied. Head Constable, Jagatsinh, had lodged complaint and handed over muddamal as well as the respondent to P.S.O. of Police Station. The substance seized was sent to Forensic Science Laboratory for analysis. The report of analysis indicated that the substance found from the possession of the respondent was charas. Investigation into the complaint lodged by Head Constable, Jagatsinh, was made by Dharmaji Thavraji who was one of the officers of Karanj Police Station. On conclusion of investigation, the respondent was chargesheeted in the Court of learned Chief Metropolitan Magistrate, Ahmedabad, of the offence punishable under Section 27 of the Act and Section 66(b) of the Bombay Prohibition Act. As the offence punishable under the Act is exclusively triable by a Special Court, the case was

committed to the City Sessions Court, Ahmedabad, for trial where it was numbered as Sessions Case No.255 of 1987. The learned Judge had framed charge at Exh.1 against the respondent of the offences punishable under Section 20(b)(ii) of the Act and Section 66(1)(b) of the Bombay Prohibition Act. The charge was read over and explained to the respondent, who had pleaded not guilty to the same and claimed to be tried. The prosecution had, therefore, examined (1) Head Constable Jagatsinh Adesinh, P.W.-1, at Exh.9; (2) Ilabhai Gulamhusen, P.W.-2, at Exh.12; (3) Pravinbhai Murarbhai, P.W.-3, at Exh.13; (4) Vinodkumar Mafabhai, P.W.-4, at Exh.14; and, (5) Dharmaji Thavraji, P.W.-5, at Exh.15, to prove its case against the respondent. The prosecution had also produced documentary evidence such as report of Forensic Science Laboratory at Exh.8, complaint filed by Head Constable - Jagatsinh at Exh.10, report submitted by Head Constable to Officer in charge of Karanj Police Station at Exh.11, etc. in support of its case against the respondent. After recording of evidence of prosecution witnesses was over, the learned Judge had explained to the respondent the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the case of the respondent was that on the date of incident, marriage of his niece was arranged and as Police Officials had demanded tea which was not supplied to them, they had filed a false case against him after taking him to Police Chawki, but he was innocent. It may be stated that no witness was examined by the respondent to substantiate the defence mentioned above.

3. On appreciation of evidence adduced by the prosecution, the learned Judge noticed that two panch witnesses had not supported the prosecution case and as stringent punishment is provided under the Act, it was not safe to rely upon the testimony of Police Officials for recording conviction. In view of the said conclusion, the learned Judge has acquitted the respondent of the offence punishable under Section 20(b)(ii) of the Act by judgment dated April 26, 1988, giving rise to instant appeal.

4. Mr.B.D.Desai, learned counsel of the State Government, contended that the reason given by the learned Judge to acquit the respondent, namely, that the panchas have not supported the prosecution case and, therefore, the prosecution case is liable to be disbelieved is not in accordance with law and, therefore, appeal should be accepted. According to the learned

counsel of the State Government, by leading cogent and reliable evidence, the prosecution has established that the respondent was found in possession of 15 gms. of charas without pass or permit and, therefore, the impugned judgment should be set aside.

5. Mr.U.S.Brahmbhatt, learned counsel of the respondent, contended that the approach of the learned Judge that the prosecution case should be disbelieved because panchas have turned hostile cannot be said to be erroneous in the facts of the case and, therefore, the appeal should be dismissed. According to the learned counsel of the respondent, the evidence does not establish that muddamal was kept in safe custody and, therefore, there being reasonable possibility of tampering with and/or substitution of the substance allegedly found from the possession of the respondent, acquittal of the respondent should be confirmed.

6. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. The main reason which has weighed with the learned Judge of the trial Court in acquitting the respondent, is that the panchas have not supported the prosecution case. However, a panch witness in a criminal case does not exercise power of veto. If the evidence of Police Official is found to be consistent and trustworthy, conviction can be based on testimony of the Police Official notwithstanding the fact that panch witness has turned hostile. Whether to believe testimony of a Police Official or not when a panch witness has turned hostile would depend upon the facts of each case and no universal proposition of law can be laid down that once panch witness has turned hostile, the prosecution case should be thrown over board. Therefore, the approach adopted by the learned Judge cannot be approved by this Court, and it is held that conviction can be recorded if testimony of police official is found to be reliable notwithstanding the fact that panch witness has turned hostile.

7. However, on re-appreciation of the evidence, this Court finds that there are certain glaring infirmities in the prosecution case which go to the root of the matter and, therefore, acquittal of the respondent is not liable to be disturbed in instant appeal. The evidence of the two constables examined by the prosecution would indicate that on spotting the respondent, he was apprehended and immediately his person was searched. Section 50 of the

Act mandates that when any officer duly authorized under Section 42 is about to search any person under the provisions of Sections 41, 42 or 43 of the Act, he shall, if such person so requires, take such person to the nearest gazetted officer or magistrate. The record does not indicate that Head Constable, Jagatsinh, had informed the respondent of his right under subsection (1) of Section 50 of being taken to the nearest gazetted officer or magistrate for making search though he was acting on prior information. The search made by a Police Officer on prior information without informing the person of his right that if he so requires, he shall be taken before gazetted officer or magistrate for search may not vitiate the trial, but would render the recovery of illicit article suspect and vitiate the conviction and sentence where the conviction has been recorded only on the basis of possession of illicit article. Neither any of the two police officers examined in the case nor the contents of panchnama or complaint lodged by Head Constable, Jagatsinh, indicate that the provisions of Section 50 of the Act were complied with. This infirmity goes to the root of the matter making the recovery of illicit article suspect. Further, the two police officers have maintained before the Court that while sealing the substance found from possession of the respondent, the signatures of panch witnesses were obtained on paper-packet itself, but the report of the analysis does not indicate that there were signatures of the panch witnesses on the packet which was sent for analysis. This discrepancy is not explained by any of the prosecution witnesses. The contents of the report of analysis contradict the evidence adduced by the two police officers and, therefore, it would not be safe to convert the acquittal into conviction. The record also shows that the contraband substance was recovered from possession of the respondent on November 23, 1986, but sealed packet containing the contraband substance was sent to Forensic Science Laboratory along with forwarding letter dated January 6, 1987. No evidence worth the name is adduced as to how the muddamal was maintained between November 23, 1986 and January 6, 1987. It was duty of the prosecution to establish before the Court by leading cogent evidence that sealed muddamal was kept in safe custody so as to rule out the possibility of tampering with and/or substitution of substance found. Because of paucity of evidence, the possibility of tampering with and/or substitution of the substance allegedly found from the possession of the respondent is not ruled out. In view of these glaring defects in the prosecution case, it is not safe to convert the acquittal into conviction and, therefore, acquittal appeal will have to be dismissed.

8. For the foregoing reasons, the appeal fails, and is dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M. Panchal, J.)

(M.H. Kadri, J.)

Rajendra